155-54

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 765.

THOMAS WESTMORELAND, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

FILED JULY 26, 1894.

(15619.)

SUPREME COURT OF THE UNITED STATES.

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1 In the circuit court of the United States of America, for the eastern district of Texas, in the fifth circuit.

Be it remembered, that at a regular term of the circuit court of the United States of America for the eastern district of Texas, in the fifth circuit, begun and held at the court rooms of said court in the city of Paris, in said district, on the first Monday, the same being the second day of April, A. D. 1894, present and presiding, the honorable David E. Bryant, United States district judge, and which term adjourned on the 14 day of July, A. D. 1894, the following cause came on for trial, to wit:

THE UNITED STATES OF AMERICA
v.
THOMAS WESTMORELAND. } No. 557. Charge: Murder.

2 Be it remembered, that a regular term of the honorable circuit court of the United States for the eastern district of Texas was begun and holden at the court rooms of said court in the city of Paris, Texas, on this third Monday (the twentieth day) of November, A. D. 1893.

Present and presiding, Hon. David E. Bryant, judge. Also present, Hon. R. E. Hannay, U. S. attorney; Frank Lee, esq., assistant U. S. attorney; J. J. Dickerson, U. S. marshal, and C. Dart, clerk, by H. H. Kirkpatrick, deputy, when the following proceedings were had, to wit:

* * * * * * *

WEDNESDAY, *December 6th*, 1893.

Court met pursuant to adjournment.

Presiding and present, Hon. D. E. Bryant, judge; R. E. Hannay, esq., U. S. attorney; J. J. Dickerson, U. S. marshal, and Frank Lee, esq., asst. U. S. atty.; and C. Dart, clerk, by H. H. Kirkpatrick, deputy.

This day came the grand jury and, a quorum being present, presented, in open court, the following bills of indictment, to wit:

THE UNITED STATES
v.
THOMAS WESTMORELAND. } Charge: Murder.

3 Each of which bills of indictment the clerk is ordered to file and enter on the proper dockets.

In the name and by the authority of the United States of America.—In the circuit court of the United States of America for the eastern district of Texas, in the fifth circuit.

At a stated term of the circuit court of the United States of America for the eastern district of Texas, in the fifth circuit, begun and held at Paris, Texas, within and for the district and circuit aforesaid, on the third Monday, the same being the twentieth day of November, in the year of our Lord eighteen hundred and ninety-three, and continued by adjournment to and including the sixth day of December, in the year of our Lord eighteen hundred and ninety-three.

Eastern district of Texas, Set., the grand jurors of the United States of America, duly elected, impaneled, tried, sworn, and charged to inquire into

and due presentment make of offenses against the laws of the United States of America in and for the district and circuit aforesaid, on their oaths in said court present: That one Thomas Westmoreland, a white person and not an Indian nor a citizen of the Indian Territory, late of
4 Pickens County, Chickasaw Nation, Indian Territory, in the district and circuit aforesaid, on the fifteenth day of June, in the year of our Lord eighteen hundred and ninety-three, in Pickens County, in the Chickasaw Nation, in the Indian Territory, the same being annexed to and constituting a part of the said fifth circuit, and annexed to and constituting a part of the eastern district of Texas for judicial purposes, and being within the jurisdiction of this court, did unlawfully, fraudulently, and feloniously, and with his malice aforethought, and with certain drugs and poisons, to wit: strychnine and certain poisons to the grand jurors unknown, then and there given and administered by the said Thomas Westmoreland to one Robert Green with the unlawful and felonious intent of the said Thomas Westmoreland then and there to take the life of him, the said Robert Green.

And he, the said Thomas Westmoreland, did then and there, by administering the said poison, as aforesaid, unlawfully, knowingly, and feloniously poison him, the said Robert Green, from the effects of which said poison he, the Robert Green, did languish, and languishing did then and there die on the fifteenth day of June, A. D. eighteen hundred and ninety-three, and within a year and a day from said date.

And the said grand jurors aforesaid, upon their oaths aforesaid,
5 do say that upon the day aforesaid, at the place aforesaid, with said poison aforesaid, used as aforesaid, and in the manner aforesaid, the said Thomas Westmoreland did unlawfully, feloniously, and with his malice aforethought, kill and murder the said Robert Green. The said Thomas Westmoreland and he, the said Robert Green, being then and there white persons and not Indians, nor citizens of the Indian Territory, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

C. M. RAGLAND,
Foreman of the Grand Jury.
FRANK LEE,
Asst. U. S. Attorney, Eastern District of Texas.

(Endorsed:) "No. 557. The United States vs. Thomas Westmoreland. Charge: Murder. A true bill. C. M. Ragland, foreman of the grand jury. U. S. witnesses: Clay Russell, Courtney, I. T.; Dock Vowell, Petersburgh, I. T.; Will Pipes, Courtney, I. T.; Dr. John Malcomb, Courtney, I. T.; Mrs. Mollie Davis, Courtney, I. T.; Jim Hogue, Courtney, I. T.; Sherman Hogue, Courtney, I. T. Returned and filed in open court 6th day of December, 1893. C. Dart, clerk, by H. H. Kirkpatrick, deputy. Sec. 5339.

6 (Further endorsed:) "U. S. witnesses: Jim Evans, Courtney Flats, I. T.; Med Perry, Healdton, I. T.; Joe Hatley, Spanish Fort, Tex.; William Langly, Cowlington, I. T."

(Further endorsed:) "We, the jury, find the defendant, Thomas Westmoreland, guilty of murder in the Indian country, as charged in this indictment. D. R. BLAIR, Foreman. Apr. 30, '94."

Be it remembered that on the first Monday of April, A. D. 1894, the same being the second day of said month, there was begun and holden at the court rooms in the city of Paris, Texas, a regular term of the honorable circuit court of the United States for the eastern district of Texas, when the following proceedings were had, to-wit:

MONDAY, *the* 30 *day of April, A. D.* 1894.

Present, the honorable D. E. Bryant, judge, presiding. The following, among other proceedings, were had, to wit:

7 THE UNITED STATES *vs.* THOMAS WESTMORELAND. } No. 557. Circuit court. Crminal docket.

This cause coming on this day to be heard, came the United States, by her attorney, and announced ready for trial, and the defendant, Thomas Westmoreland, in his own proper person, and by attorney, appeared and announced ready, and the said defendant, being arraigned, plead not guilty, and thereupon came a jury of twelve good and lawful men, to wit, G. P. Shelton, P. M. Spears, D. R. Blair, G. W. Fooshee, B. F. Commander, Geo. Wagner, Squire Adams, F. B. Mason, R. H. Gullick, Jake Spangler, W. E. Oxford, R. W. Emerson, who, having been duly tried, impaneled, and sworn as required by law, and having heard the evidence and the argument of counsel and received the charge of the court, retired to consider of their verdict, and on the same day brought into open court their verdict, in words and figures as follows, to wit: We, the jury, find the defendant, Thomas Westmoreland, guilty of murder in the Indian country, as charged in this indictment.

D. R. BLAIR, *Foreman.*

APR. 30, '94.

It is therefore considered by the court that the defendant, Thomas Westmoreland, is guilty of murder, as charged in the indictment and as found by the jury, and it is ordered that he be remanded to the custody of the marshal to await the judgment and sentence of the court.

8 In the circuit court of the United States for the eastern district of Texas, 5th circuit, at Paris, Texas.

UNITED STATES *vs.* THOMAS WESTMORELAND. }

Now comes the defendant in the above-entitled cause and moves the court to arrest the judgment in this cause because the indictment in this cause does not charge that the offence was committed in a place within the exclusive jurisdiction of the United States.

And further moves the court to arrest the judgment in this cause for the following additional reason: That the indictment in this cause charges that the offence was committed in the Chickasaw Nation, Indian Terri-

tory, and that the indictment and the laws of the United States show that said Chickasaw Nation and Indian Territory is not within the exclusive jurisdiction of the United States.

CAMPBELL & WEST,
Attys. for Deft.

(Endorsed:) No. 557. The United States vs. Thomas Westmoreland. Motion in arrest of judgment. Filed May 1, 1894. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

9 In the circuit court of the United States for the eastern district of Texas, at Paris, 5th circuit.

THE UNITED STATES)
vs.
THOMAS WESTMORELAND.)

Now comes the defendant, leave of the court being had and obtained, and amends his motion in arrest of judgment filed herein on the day of , 1894, and for amendment asks the court to arrest the judgment in this cause for the following reasons, to wit:

1st. The indictment does not allege that the offence sought to be charged therein is within the exclusive jurisdiction of this court.

2nd. The allegations in said indictment do not show that this court has jurisdiction over the offense sought to be charged.

3rd. The indictment does not allege that Robert Green drank the poison or took it into his stomach in any way or that it was injected into his body.

4th. The indictment does not allege that the act was wilfully done.

5th. The indictment does not allege that the deft. knew that the potion administered was poisonous and would produce death.

6th. The indictment does not allege that the deceased did not know what the potion contained.

10 ROBT. H. WEST,
Atty. for Deft.

(Endorsed:) United States vs. Thomas Westmoreland. Amended motion in arrest of jud'm't. Filed May 17, 1894. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

SATURDAY, *May 19th*, 1894.

Court met pursuant to adjournment.

Present and presiding, Hon. D. E. Bryant, judge. Also present, R. E. Hannay, esq., U. S. attorney; Frank Lee, esq., assistant U. S. attorney; J. S. Williams, U. S. marshal, and C. Dart, clerk, by H. H. Kirkpatrick, deputy.

THE UNITED STATES)
v.) 557.
THOMAS WESTMORELAND.)

This day came on to be heard the motions of the defendant in arrest of the judgment herein, and the argument of counsel thereon being heard, the same was taken under advisement by the court.

11 SATURDAY, *June* 2, 1894.

Court met pursuant to adjournment.

Present and presiding, Hon. D. E. Bryant, judge. Also present, R. E. Hannay, esq., U. S. attorney; Frank Lee, esq., asst. U. S. attorney; J. S. Williams, U. S. marshal, by R. Herz, deputy, and C. Dart, clerk, by H. H. Kirkpatrick, deputy.

THE UNITED STATES *vs.* THOMAS WESTMORELAND. } 557.

This day this cause came on for further hearing, and the court being fully advised in the premises, because it is the opinion of the court that the law is against the defendant, the motions in arrest of judgment herein are overruled and denied, to which ruling of the court the defendant in open court excepted.

12 SATURDAY, *June* 16, 1894.

Court met pursuant to adjournment.

Present and presiding, Hon. D. E. Bryant, judge. Also present, R. E. Hannay, esq., U. S. atty.; Frank Lee, esq., asst. U. S. atty.; J. S. Williams, U. S. marshal, and C. Dart, clerk, by H. H. Kirkpatrick, deputy.

THE UNITED STATES *vs.* THOMAS WESTMORELAND. } 557.

On motion of R. E. Hannay, esq., attorney of the United States for the eastern district of Texas, the above-named defendant, Thomas Westmoreland, was this day brought to the bar of the court, in custody of the marshal, and being asked by the court, in open court, if he had anything to say why the judgment and sentence of the court should not be pronounced upon him in accordance with the verdict of guilty returned by the jury in this cause on the 30th day of April, 1894, and the law in such cases made and provided, and no good cause being shown why the judgment and sentence should not be pronounced herein, it is, therefore, considered by the court that the defendant, Thomas Westmoreland, is

13 guilty of murder as charged in the indictment and as found by the jury; and it is ordered, adjudged, and decreed by the court that the defendant, Thomas Westmoreland, for his crime of murder of which he stands condemned, be now remanded to the custody of the marshal of the United States for the eastern district of Texas, and be by him committed to the jail of Lamar County, Texas, and there kept securely confined until Friday, the 28th day of September, A. D. 1894, when, between the hours of 10 o'clock a. m. and 4 o'clock p. m. of said day, he, the said Thomas Westmoreland, shall be taken therefrom to the yard of the said jail and then and there be, by the marshal aforesaid, hanged by the neck until he, the said Thomas Westmoreland, is dead.

And the clerk of this court is ordered to issue a death warrant directed to the marshal aforesaid commanding the due execution of this judgment and sentence according to law.

To which judgment of the court defendant then and there in open court excepted.

Circuit court of the United States for the eastern district of Texas, at Paris, 5th circuit.

THE UNITED STATES
vs.
THOMAS WESTMORELAND.

To the Hon. DAVID BRYANT,
Presiding Circuit Judge:

14 Your petitioner, Thomas Westmoreland, defendant in the above-styled cause, respectfully alleges that in the records and proceedings of the circuit court of the United States for the eastern district of of Texas, at Paris, in the above-styled cause, as well as the final judgment therein, there are manifest errors;

Wherefore your petitioner prays that a writ of error issue for the removal of said cause into the Supreme Court of the United States for review and revision, and that said judgment be reversed.

CAMPBELL & WEST,
Attys. for Deft., Thomas Westmoreland.

Allowed and proceedings stayed.
JUNE 19, 1894.

A. P. MCCORMICK,
U. S. Circuit Judge, Fifth Judicial Circuit.

(Endorsed:) The United States vs. Thomas Westmoreland. Petition for writ of error. Filed June 19, 1894. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

15 Circuit court of the United States for the eastern district of Texas, fifth circuit.

THE UNITED STATES
vs.
THOMAS WESTMORELAND.

Now, at this time comes Thomas Westmoreland, defendant in the above-styled cause, and makes and submits the following assignment of errors committed by the circuit court on the trial of said cause:

The court erred in overruling the motion made by the defendant to arrest the judgment in the above-styled cause for the following reasons:

Because the indictment did not allege facts showing that the court had exclusive jurisdiction to try and determine the offense charged, and did not allege facts showing that the court had any jurisdiction over the offense charged, and did not allege that said poison was taken into the stomach of said Robert Green, or injected into his body, or how said poison was administered; and did not allege that said Thomas Westmoreland knew

that the potion administered was a deadly poison, and did not charge that the said Thomas Westmoreland wilfully administered the same, and did not charge that the said Robert Green did not know that the potion administered was a deadly poison.

All of which appears in defendant's bill of exceptions.

CAMPBELL & WEST,

16 *Attys. for Deft.*

(Endorsed:) The United States vs. Thomas Westmoreland. Assignment of errors. Filed June 19, 1894. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

17 In the circuit court of the United States for the eastern district of Texas at Paris, 5th circuit.

THE UNITED STATES)
vs.
THOMAS WESTMORELAND.)

Be it remembered that upon the trial of the above-entitled cause the following proceedings were had, to-wit:

The defendant, Thomas Westmoreland, was indicted by the grand jury of said court at Paris on the charge of murder, which indictment was filed in said court on the 6th day of December, 1893, which indictment reads as follows:

In the name and by the authority of the United States of America.—In the circuit court of the United States of America for the eastern district of Texas, in the Fifth circuit.

At a stated term of the circuit court of the United States of America, for the eastern district of Texas, in the Fifth circuit, begun and held at Paris, Texas, within and for the district and circuit aforesaid, on the third Monday, the same being the twentieth day of November in the year of our Lord eighteen hundred and ninety-three, and continued by adjournment to and including the sixth day of December in the year of our Lord eighteen hundred and ninety-three.

Eastern district of Texas, Set., the grand jurors of the United States of America, duly elected, impaneled, tried, sworn, and charged to

18 inquire into and due presentment make of offenses against the laws of the United States of America, in and for the district and circuit aforesaid, on their oaths in said court present: That one Thomas Westmoreland, a white person, and not an Indian nor a citizen of the Indian Territory, late of Pickens County, Chickasaw Nation, Indian Territory, in the district and circuit aforesaid, on the fifteenth day of June in the year of our Lord eighteen hundred and ninety-three, in Pickens County, in the Chickasaw Nation, in the Indian Territory, the same being annexed to and constituting a part of the said fifth circuit, and annexed to and constituting a part of the eastern district of Texas, for judicial purposes, and being within the jurisdiction of this court, did unlawfully, fraudulently, and feloniously, and with his malice aforethought, and with certain drugs and poisons, to wit, strychnine and certain poisons to the grand jurors unknown, then and there

given and administered by the said Thomas Westmoreland to one Robert Green, with the unlawful and felonious intent of the said Thomas Westmoreland then and there to take the life of him, the said Robert Green. And he, the said Thomas Westmoreland, did then and there, by administering the said poison as aforesaid, unlawfully, knowingly, and feloniously poison him, the said Robert Green, from the effects of which said poison he, the Robert Green, did languish, and languishing did then and there die on the fifteenth day of June, A. D. eighteen hundred and ninety-
19 three, and within a year and a day from the said date.

And the said grand jurors aforesaid, upon their oaths aforesaid, do say that upon the day aforesaid, at the place aforesaid, with said poison aforesaid, used as aforesaid and in the manner aforesaid, the said Thomas Westmoreland did unlawfully, feloniously, and with his malice aforethought, kill and murder the said Robert Green, the said Thomas Westmoreland and he, the said Robert Green, being then and there white persons, and not Indians nor citizens of the Indian Territory, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

C. M. RAGLAND,
Foreman of the Grand Jury.
FRANK LEE,
Asst. U. S. Attorney, Eastern District of Texas.

(Endorsed:) No. 557. The United States vs. Thomas Westmoreland. Charge: Murder. A true bill. C. M. Ragland, foreman of the grand jury. U. S. witnesses: Clay Russell, Courtney, I. T.; Dock Vowell, Petersburgh, I. T.; Will Pipes, Courtney, I. T.; Dr. John Malcome, Courtney, I. T.; Mrs. Mollie Davis, Courtney, I. T.; Jim Hogue, Courtney, I. T.; Sherman Hogue, Courtney, I. T. Returned and filed in open court 6th day of December, 1893. C. Dart, clerk, by H. H. Kirkpatrick, deputy. Sec. 5339. U. S. witnesses, continued: Jim Evans, Courtney Flats, I. T.; Med Perry, Healdton, I. T.; Joe Hatley, Spanish Fort, Tex.; William Langley, Cowlington, I. T.

20 On the 30th day of April, A. D. 1894, said Thomas Westmoreland was duly arraigned and tried before said court upon said charge, and a verdict of guilty was returned by the jury, and the proper judgment and entry made thereon in said court.

The defendant, on the 1 day of May, A. D. 1894, filed in said court his motion in arrest of judgment in said cause, setting out as grounds therefor as follows:

1st. Because the indictment in said cause did not set out facts sufficient to show that said court had exclusive jurisdiction to try and determine said cause.

2nd. Because the indictment in said cause did not set out facts sufficient to show that the court had jurisdiction to try and determine said cause.

3rd. Because the indictment in said cause did not show how said poison was administered; whether it was taken into the stomach of said Robert Green, injected into his body, or how it was administered to him.

Because said indictment does not show that the potion administered by deft. was known by deft. to be a deadly poison.

Because said indictment does not allege that said poison was wilfully administered to said Robert Green by deft., and does not allege that said Robert Green did not know that said poison was a deadly poison; which motion was overruled by the court on the 2nd day of June, 1894, and before the adjournment of the term of said court at which said trial was
21 had, and the court proceeded to sentence defendant upon said indictment, verdict, and judgment to death, to which action of the court, overruling said motion and sentencing said deft. to be hung, the defendant in open court objects, and tenders this bill of exceptions and asks that the same be signed as such, which is accordingly done in open court.

Approved & ordered filed as a part of the record in this cause. July 2nd, A. D. 1894.

DAVID E. BRYANT,
Judge Presiding at said Trial.

(Endorsed:) The United States vs. Thomas Westmoreland. Bill of exceptions. Filed July 3rd, 1894. C. Dart, clerk, by Mel Kirkpatrick, deputy.

22 UNITED STATES OF AMERICA, *ss.:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the eastern district of Texas at Paris, greeting:

Because in the record and proceedings as also in the rendition of the judgement of a plea which is in the said circuit court before you or some of you between the United States, who is plaintiff, and Thomas Westmoreland, who is defendant, a manifest error hath happened, to the great damage of the said defendant, Thomas Westmoreland, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf do command you, if judgement be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within sixty days in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court the day of June, in the year of our Lord one thousand eight hundred and ninety-four.

[SEAL.] JAMES HALL MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

A. P. MCCORMICK,
Cir. Judge.

(Indorsed:) The United States vs. Thomas Westmor'land. Writ of error. Filed June 19, 1894. C. Dart, clerk. By H. H. Kirkpatrick, deputy.

I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, hereby certify that I received this writ on the 19th day of June, 1894, and that on this 21 day of July, 1894, I have transmitted to the clerk of the Supreme Court of the United States a copy of the record and proceedings in the within-named cause duly certified under my hand and seal.

Witness my hand and the seal of said court at my office in the city of Paris the day and date last above named.

[SEAL.] C. DART, *Clerk*,
By MEL KIRKPATRICK, *Deputy*.

23 The United States of America to Robert E. Hannay, United States district attorney for the eastern district of Texas, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington within sixty days from the date hereof pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Texas (5th circuit), sitting at Paris, wherein Thomas Westmoreland is plaintiff in error and the United States is defendant in error to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this, the 19 day of June, in the year of our Lord one thousand eight hundred and ninety-four.

A. P. MCCORMICK,
U. S. Circuit Judge, 5th Judicial Circuit.

(Endorsed:) The United States vs. Thomas Westmoreland. Citation in error. Filed June 25th, 1894. C. Dart, clerk, by H. H. Kirkpatrick, deputy. Service accepted this 22 June, 1894. Robt. E. Hannay, United States attorney, eastern district of Texas.

24 I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, do hereby certify that the foregoing 23 pages of transcript contain and embrace a true copy of the record, bill of exceptions, assignment of errors, and of all proceedings in the case of The United States, plaintiff (defendant in error), against Thomas Westmoreland, defendant (plaintiff in error).

To certify which, witness my hand and the seal of said circuit court of the United States, at Paris, in said district, this 21st day of July, in the year of our Lord eighteen hundred and ninety-four.

[SEAL.] C. DART, *Clerk*,
By MEL KIRKPATRICK, *Deputy*.

(Indorsed on cover:) Supreme Court U. S., clerk's office. Received July 26, 1894. Case No. 15649. Term No., 765. Thomas Westmoreland, plaintiff in error, vs. The United States. E. Texas, C. C. U. S. Filed July 26th, 1894.

Office Supreme Court, U. S.
FILED.
OCT 4 1894
JAMES H. McKENNEY.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THOMAS WESTMORELAND, PLAINTIFF in error,
vs.
THE UNITED STATES.
No. 765.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THOMAS WESTMORELAND, PLAINTIFF in error,
vs.
THE UNITED STATES.
} No. 765.

MOTION TO ADVANCE.

The plaintiff in error was convicted in the circuit court of the United States for the eastern district of Texas on April 30, 1894, and on June 16, 1894, was sentenced to be hanged, for the murder of one Robert Green, committed on June 15, 1893, in Pickens County, in the Choctaw Nation, in the Indian Territory.

In accordance with rule 26, section 3, and the provisions of section 6 of the act of February 6, 1889, c. 113 (25 Stats., 656), the Solicitor-General respectfully moves the court to advance the case upon the docket and set it down for hearing at such time during the present term as may be convenient to the court.

Notice of this motion has been served on the plaintiff in error and proof of service filed with the clerk.

LAWRENCE MAXWELL, JR.,
Solicitor-General.

DEC 10 1894
JAMES H. MCKENNEY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 765.

THOMAS WESTMORELAND, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

Gulledge's Ardmore Job Printing House.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 765.

THOMAS WESTMORELAND, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

The first contention in this case is that the indictment does not show that any law of the United States has been violated. There are no common law offenses against the United States. All offenses are statutory. United States vs. Hudson and Goodwin, 7th Cranch, 32.

As this offense was charged to have been committed in the Chickasaw Nation, we look to sections 2145 and

2146, Revised Statutes of the United States, to ascertain whether or not the offense comes within the jurisdiction of the United States Court.

Article 38 of the treaty between the United States and the Choctaw and Chickasaw Indians, made in 1860, provides that any person having married a Choctaw or Chickasaw Indian shall be deemed a member of the tribe into which he marries, and subject to the jurisdiction of the Indian Court.

The indictment does not allege that Thomas Westmoreland and the deceased were not members of the same tribe of Indians. It does allege that they are white persons and not Indians, and not citizens of the Indian Territory. See transcript, pages 1 and 2.

A white man married to a Choctaw or Chickasaw would not be an Indian—would not be a citizen of the Indian Territory, but would be subject to the jurisdiction of the Indian courts, being a member of the tribe by marriage.

The allegation (not a citizen of the Indian Territory) is surplusage and defines nothing. The Indian Territory, in the sense of a territory, has no citizens. It is not known in law. The statutes of the United States use the term Indian country.

There is a section of country set apart to the five civilized tribes and other tribes that is commonly called the Indian Territory. Within its boundaries are sev-

eral different and distinct Indian governments. A member of either tribe might be termed a citizen of that tribe but not a citizen of the Territory.

For instance, a man may be a citizen of Texas, he may be a citizen of the United States, but it would not be proper to say that he was a citizen of America.

America and the Indian Territory stand in the same light as to citizenship. Each embraces numerous governments. They are descriptive of territory, or as might be more properly termed localities.

A citizen is one who has the privilege of exercising the elective franchise. In some of the tribes in the Indian Territory the whites who have married Indians have the right to vote. In others they have not. A white man who has married an Indian could not be termed a citizen of the Indian Territory, for the reason that such marriage might confer citizenship upon him in one tribe and not in another.

The situation here is a little peculiar. The laws of the United States are not generally enforced, but are only enforced as to certain people.

The pleader must show that the parties come within the jurisdiction of the United States, and do not come within the exceptions set out in Section 2146 of Revised Statutes of the United States.

It is just as important to allege those facts as it is to allege the locality in which the offense is committed.

It is jurisdictional. U. S. vs. Morrisey, 32 Fed. Rep. 152. U. S. vs. Dow, Taney, 34.

The next contention is that the indictment does not allege that said Westmoreland knew the potion administered was a deadly poison. It should show that fact. See transcript, pp. 1 and 2.

We might infer from the allegation (with the unlawful and fellonious intent of the said Thomas Westmoreland then and there to take the life of said Robert Green) that he knew it to be a deadly poison, but it is not so alleged. We cannot aid the indictment by inference.

The indictment must allege every ingredient of the offense with scrupulous certainty. Chitty's crim. law, vol. 1, pp. 172, 281, 282 and 283, 5 Amer. ed. Wharton's P. and P., sec. 225, 8th ed. U. S. vs. Cook, 17 Wallace 174. U. S. vs. Cruikshank et al., 2d Otto, 550. U. S. vs. Bettilini, 1st Woods, 655. U. S. vs. Scott, 4th Bissell, 29. U. S. vs. Ballard, 13 Ind. Rev. Reg., 695.

The indictment does not charge that the poison was taken into the stomach of said Green. Bish. criminal proc., vol. 2. Sec. 553, 3d ed. For form of indictment for murder by poison see Bishop's directions and forms, Section 533.

All of which is respectfully submitted.

C. L. HERBERT,

Attorney for Plaintiff in Error.

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CASE No. 15649.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR DEFENDANT IN ERROR.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR DEFENDANT IN ERROR.

The plaintiff in error, a white man, was indicted for the murder, on June 15, 1893, of one Robert Green, in the Chickasaw Nation, in the Indian Territory. He was tried before Judge Bryant and a jury, and convicted on April 30, 1894.

The sole assignments of error are to the denial of a motion in arrest of judgment, on the ground of alleged defects in the indictment.

The indictment was for poisoning.

The first point taken is that the offense is not alleged to have been committed within the exclusive jurisdiction of the court, and that the allegations of the indictment do not show that the court had jurisdiction over the offense charged. It is alleged that the offense was committed "in Pickens County, in the Chickasaw Nation, in the Indian Territory, the same being annexed to and constituting a part of the said fifth circuit, and annexed to and constituting a part of the eastern district of Texas, for judicial purposes, and being within the jurisdiction of this court." The Chickasaw Nation is annexed for this purpose to the eastern district of Texas (act of March 1, 1889, ch. 333, §§ 17, 18). Thus the court obtains jurisdiction of murders committed by white men within said nation (Rev. Stat., §§ 5339, 2145). The court takes judicial notice of the extent of its own jurisdiction (*Hoyt* v. *Russell*, 117 U. S., 401, 404). A similar objection was urged and overruled in *Caha* v. *United States*, 152 U. S., 211.

The next objection to the indictment is that it "does not allege that Robert Green drank the poison or took it into his stomach in any way, or that it was injected into his body." This objection is apparently based on a remark of Mr. Bishop, on not very satisfactory authority, that the poison must be alleged to have been taken into the stomach. (2 Bishop Crim. Proc., § 556.)

Section 1025 of the Revised Statutes provides as follows:

> No indictment * * * shall be deemed insufficient * * * by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.

It is respectfully submitted that this alleged defect, if a defect at all, is one of form. In *United States* v. *Jackson*, 2 Fed. Rep., 502, 504, Judge Lowell says:

> It is somewhat difficult to say what is form and what is substance in an indictment. * * * Mere mistakes, however serious, in expressing the substance of a crime, if the meaning can be understood, I look upon as formal.

In *Babcock* v. *United States*, 34 Fed. Rep., 873, 876, Mr. Justice Brewer said, applying this section to an indictment for perjury:

> Can anything be clearer than that the defendant knew precisely what he was charged with, and that there was no doubt or uncertainty in the matter?

As so construed this section of the Revised Statutes is substantially equivalent to the Minnesota statute (Minn. Rev. Stat., ed. 1851, p. 543, § 66) directing that an indictment shall contain "a statement of the acts constituting the offense in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." Under this section, in *Bilansky* v. *State* (3 Minn., 427, 436) Flandrau, J., said that in an indictment for murder by poison, an allegation that the murder was committed "by administering to him poison" would have been sufficient without anything further. The statute in that State, however, provided a form of indictment containing these words.

The unimportance of such details, even at common law, is illustrated by the fact that although it was deemed necessary to allege what kind of poison was administered, nevertheless evidence proving the use of a different kind

of poison was considered to be an immaterial variance. (2 Hale P. C., 185; 2 Bishop Crim. Proc., §§ 514, 555; 1 Russell on Crimes, pp. 556–7.)

The other objections to the indictment seem still more clearly to come within the provisions of § 1025.

Since the foregoing was put in type, the brief of plaintiff in error has been filed in this court. The plaintiff's counsel now raises the point that the indictment is insufficient, in that it failed to allege with sufficient precision the race and nationality of the prisoner. Counsel's point is that the indictment should with great particularity negative every possibility that the case might come within one of the exceptions recognized in § 2146 of the Revised Statutes.

It may be remarked that this indictment is more definite than the form customarily used in criminal cases arising in the Indian Territory. (See indictments in Arkansas cases, such as *In re Mayfield*, 141 U. S., 107, 108; *Pointer* v. *United States*, 151 U. S., 396, 398.) The usual formula contains simply the words "a white man and not an Indian," or "a negro and not an Indian."

It is also to be noticed that no harm is shown to have come to the prisoner, or, indeed, possibly could have occurred. His counsel did not even perceive the point now raised at the time of the original motion in arrest of judgment. (Record, pp. 3-4.) It is doubtful whether counsel perceived it when he drew his amended motion in arrest of judgment (p. 4) or his assignment of errors (p. 6). He certainly did not make it clear as technical objections should be made clear, and therefore the defect (if there was

a defect and it was not cured by the verdict) would seem to come within § 1025 of the Revised Statutes as above construed.

§ 2145 of the Revised Statutes, extending the jurisdiction of the Federal courts over the Indian country, is made subject by § 2146 to the following exceptions:

> The preceding section shall not be considered to extend to *crimes committed by one Indian against the personal property of another Indian*, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, *or to any case where by treaty stipulations the exclusive jurisdiction over such an offense is or may be secured to the Indian tribes, respectively.*

The language first italicized is taken from the statute of June 30, 1834, ch. 161, § 25. The word "Indian" in that section was construed in the early case of *United States* v. *Rogers*, 4 How., 567, as not applying to a white person who had been adopted into the Indian tribe. The meaning of the word in other connections has since, however, been much extended by means of treaties, and of acts of Congress and Executive practice based thereon. Treaties often expressly recognize tribal membership by marriage or adoption, as well as by race; and that a person may become a member of the Indian Nation in such manner is recognized by Congress among other places in the Oklahoma act of May 21, 1890, ch. 182, §§ 30, 31. Thus, the treaty of April 28, 1866, with the Choctaws and Chickasaws (14 Stat., 769) recognizes that persons may become Choctaws or Chickasaws "by adoption or intermarriage." (Article XXVI, XXXVIII,

pp. 777, 779.) The corresponding Cherokee treaty and the laws and decisions pertinent thereto were reviewed at considerable length in the brief filed for defendant in error in *Famous Smith* v. *United States*, 151 U. S., 50.

It is respectfully submitted that the word "Indian" in such indictments is to be given a reasonable construction in its more modern sense, including not only Indians by race, but also Indians by marriage or adoption. It is very clear from the context that the word is used in this sense by pleaders in the western district of Arkansas, where this phraseology seems to have been long established as a precedent. The words "a *white man and not* an Indian" show plainly that the pleader considers it possible that a white man may be an Indian within the legal meaning of the latter term; that "Indian" is used broadly; in other words, that it is not sufficient in drawing an indictment to say simply that the criminal, or the person against whom the crime was committed, as the case may be, was a white man.

If, however, the word "Indian" were to be given its narrower sense, still we have in this indictment the additional words "nor a citizen of the Indian Territory." The Indian Territory, though not a Territory in the usual meaning of the word, is a section of the country recognized and defined by statute. (Oklahoma Act, § 1.) It is mainly composed of the regions of country belonging to five tribes which are recognized and known as the "Five Civilized Tribes," or "Five Civilized Nations." (Id., §§ 1, 30, 31.) Giving the words a reasonable construction, a citizen of any one of the Five Civilized Tribes is a citizen of the Indian Territory. That Territory, though it has

no governor nor legislature, has an established court, before which in many cases (such as those of disputes between members of different tribes) all inhabitants of the Territory stand on an equal footing. That membership in one of these civilized tribes amounts to citizenship is recognized in their treaties. (Choctaw and Chickasaw Treaty, Art. XXVI, 14 Stat., 777; Creek Treaty, Art. II, id., p. 786; Seminole Treaty, Art. II, id., p. 756; Cherokee Treaty, Art. XXVII, id., p. 806.) These tribes have their printed statute books, which define the rights of citizenship, and also of suffrage (which is not, as supposed by the prisoner's counsel, coextensive therewith), with precision. (See, for instance, the Chickasaw Constitution and Laws, edition of 1878, pp. 5, 16, 76–7.) The words "citizen of the Indian Territory" seem to have been selected not inaptly to include persons protected by the last clause of § 2146 of the Revised Statutes.

It is respectfully submitted that the judgment should be affirmed.

EDWARD B. WHITNEY,
Assistant Attorney-General.